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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of ORIGINAL

Amendment of the Commission's Regulatory Policies to Allow Non-U.S.-Licensed Space Stations to Provide Domestic and International Satellite Service in the United States	)	IB Docket No. 96-111
and	)	
Amendment of Section 25.131 of the Commission's Rules and Regulations to Eliminate the Licensing Requirement for Certain International Receive-Only Earth Stations	)	CC Docket No. 93-23 RM-7931
and	)	
COMMUNICATIONS SATELLITE CORPORATION Request for Waiver of Section 25.131(j)(1) of the Commission's Rules As It Applies to Services Provided via the Intelsat K Satellite	)	File No. ISP-92-007

COMMENTS OF PANAMSAT CORPORATION

PanAmSat Corporation ("PanAmSat"), by its attorneys, hereby submits the following comments with respect to the Further Notice of Proposed Rulemaking (the "Further Notice") in the above-captioned proceeding.

INTRODUCTION

PanAmSat, a longstanding and outspoken proponent of full and fair competition in the satellite services market, urges the Commission to follow through on its commitments in this rulemaking proceeding to recast its satellite licensing policies in a manner that will foster a fully competitive international and domestic satellite market. As PanAmSat has maintained since the inception of this proceeding over two years ago, permitting foreign-licensed satellites to participate in

the U.S. market will foster competition in the United States and globally and serve as an inducement to other countries to open their markets to full competition.[1]

With these objectives in mind, PanAmSat was an active participant and stalwart supporter of the U.S. government's efforts to conclude a World Trade Organization Agreement on Basic Telecommunications Services (the "WTO Basic Telecom Agreement") that would remove barriers to a fully-competitive global telecommunications market. Now that the WTO Basic Telecom Agreement is in place, PanAmSat urges the Commission to move expeditiously in this proceeding to implement the agreement with respect to WTO member countries and, further, to adopt pro-competitive rules governing requests by non-WTO members to serve the U.S. market.

I. APPLICATION OF AN ECO-SAT TEST.

A. WTO Covered Services and Countries. Simply put, it would be inconsistent with U.S. government commitments under the WTO Basic Telecom Agreement to apply the ECO-Sat test to requests by satellite operators licensed by WTO members to provide "covered" satellite services within the United States or between the United States and a WTO member country. Accordingly, PanAmSat supports the approach proposed in the Further Notice to forego the ECO-Sat analysis with respect to such requests.[2]

Such an approach is dictated by the MFN and national treatment obligations undertaken by the U.S. government in the General Agreement on Trade in Services (the "GATS"). Further, in light of the same undertakings by the other WTO member countries, foregoing the ECO-Sat test will not imperil the pro-competitive objectives underlying this proceeding.

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[1] Comments of PanAmSat Corporation, IB Docket No. 95-41, submitted June 8, 1995, at 4.
[2] Further Notice ¶ 18.

PanAmSat, moreover, agrees that the WTO Basic Telecom Agreement does not preclude the Commission from continuing to condition or deny authorizations to provide satellite services — including those requested by operators licensed by WTO members — based on "other important public interest factors," such as national security, law enforcement, foreign policy and trade concerns, and spectrum management and technical coordination considerations.[3] In this regard, the Further Notice proposes that a party opposing a request by a WTO member to provide a covered satellite service within the United States or between the United States and a WTO member country must demonstrate that grant of such request "would pose a very high risk to competition in the United States . . . that could not be cured by conditions [the FCC] could place on the license."[4]

The Further Notice goes on to propose that, if an opposing party meets this heavy burden, the Commission "may" deny access to the United States. Although PanAmSat agrees that the burden a party opposing such a request must — in light of the MFN and national treatment commitments made in the GATS — necessarily be high, PanAmSat submits that, if such a burden is met, the Commission must, not may, deny the request. Failure to deny such a request in the face of a demonstrated "very high risk to competition" would undermine seriously the pro-competitive objectives of this proceeding and constitute a gross abdication of the Commission's responsibilities under Section 309(a) of the Communications Act of 1934, as amended.

B. Non-WTO Member Satellites. PanAmSat also agrees with the Commission's tentative conclusions that (i) the ECO-Sat test should be applied to satellites licensed by non-WTO members, regardless of whether the route market is a WTO or non-WTO member, and (ii) that a separate ECO-Sat test should be applied

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[3] Id. ¶¶ 37 and 38.
[4] Id. ¶ 18.

to the route market when the route market is a different non-WTO member.[5] In light of the fact that non-WTO members have made no commitments to open their markets, the pro-competitive goals of this proceeding will not be realized absent the application of the ECO-Sat test in this manner.

As PanAmSat demonstrated at length in its initial comments in this proceeding, however, the ECO-Sat test will not by itself facilitate the broad market access that U.S. satellite licensees need to operate globally.[6] Specifically, the ECO-Sat test would be triggered only when an application is filed seeking U.S.-landing rights for a non-WTO member system. For the many countries that are closed to U.S.-licensed satellite systems but do not seek access to the U.S. domestic and international satellite market for their own satellite systems, no U.S. landing rights application is forthcoming and the ECO-Sat test is not triggered.

Given that only a handful of non-WTO member satellite systems desire access to the U.S. market and, further, that a number of U.S.-licensed systems are aggressively seeking access to foreign markets, the ECO-Sat test provides little incentive to, and little recourse against, a non-WTO member intent on closing its market to U.S. operators. Accordingly, and as explained more fully in PanAmSat's initial comments in this proceeding, PanAmSat urges the Commission to include the openness of a non-WTO member's satellite market among the public interest factors applied when reviewing a request from a non-WTO member entity under the ECO test developed in the Foreign Carrier Order.[7]

C. Non-WTO Member Markets Served by WTO Member Satellites.

The Commission correctly points out that there may be instances where a WTO member requests to provide service between the United States and a non-

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[5] Id. ¶ 23.
[6] Comments of PanAmSat Corporation, IB Docket No. 96-111, submitted July 15, 1996, at 6-9.
[7] Report and Order, 11 FCC Rcd 3873 (1995).

WTO member country and that, because the non-WTO member is under no obligation to open its market to U.S. licensees, U.S. licensees could be placed at a substantial competitive disadvantage *vis-a-vis* operators licensed by other WTO members absent the application of an ECO-Sat test. Importantly, this competitive disadvantage would not be limited to the non-WTO route market in question: As the Commission acknowledged in the DISCO II Notice in this proceeding, in light of the inherently regional nature of satellite services, if a non-U.S. system could serve routes that cannot be served by U.S. systems, U.S. licensees would be placed at a substantial competitive disadvantage on all routes because the non-U.S. system would be able to offer a wider range of capabilities.[8]

Notwithstanding this serious competitive threat, PanAmSat shares the Commission's concern that — in light of the ability of U.S. licensees to serve all countries without additional Commission authorization — applying an ECO-Sat analysis to requests to use WTO member-licensed satellites to serve non-WTO routes may be inconsistent with the U.S. government's national treatment obligations under the GATS.[9] To avoid the possibility of contravening these obligations, PanAmSat suggests that the Commission forego for the present applying an ECO-Sat analysis to requests to use WTO member-licensed satellites for non-WTO routes. Refraining from applying ECO-Sat in these circumstances also preserves the Commission's enforcement resources by avoiding having to create a procedure for a problem that may prove non-existent. If competitive disparities arise between U.S. licensees and other WTO member licensees, however, then the Commission should revisit this issue.[10]

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[8] Amendment of the Commission's Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Satellite Service in the United States, Notice of Proposed Rulemaking, 11 FCC Rcd 18178 (1996) at ¶ 11 (the "DISCO II Notice").

[9] Further Notice ¶ 26.

[10] If the Commission were to revisit this issue, PanAmSat believes that national treatment concerns could be redressed without limiting the operational flexibility of U.S. licensees. For example, the Commission could use a rebuttable presumption that the provision of service between the United States and a non-WTO route market by both U.S.-licensed satellites and

D. Intergovernmental Satellite Organizations. PanAmSat strongly opposes allowing U.S. earth station operators to use Intelsat capacity for the provision of U.S. domestic satellite service. Intelsat's special governmental privileges and immunities give it enormous competitive advantages over U.S. satellite licensees. These advantages are compounded by the fact that the members of Intelsat are the primary (if not exclusive) providers of FSS and MSS services in most major markets.

The abolition of Intelsat's special privileges and immunities is now under review by Congress. Until that process is completed, it would be premature to consider allowing U.S. earth station licensees to use Intelsat capacity for domestic service.

In any event, unless the Commission exercises jurisdiction over Intelsat's space segment, including Intelsat pricing structures, there is too great a potential for Intelsat, through Comsat, to undercut its competitors in the domestic market by cross-subsidizing between its competitive and monopoly services. While reciprocity can serve as an effective means to ensure that foreign satellite systems are acting in the public interest, no comparable mechanism exists, without "piercing the veil" between Intelsat and Comsat, to prevent Intelsat/Comsat from acting in an anti-competitive manner.

That said, and in response to the inquiry in the Further Notice regarding the relative merits of the "route market" approach versus the "critical mass" approach discussed in the DISCO II Notice, the "critical mass" approach is inadequate as it

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other WTO member satellites is in the public interest. This presumption could be overcome with respect to a particular non-WTO route market, however, if it were demonstrated that U.S. licensees are not afforded access to such route market. If the Commission determined that authorizing service along the non-WTO route market is contrary to the public interest, then neither U.S.-licensed satellites nor satellites licensed by other WTO members would be permitted to serve the route. Because the presumption would apply equally to U.S.-licensed satellites and other WTO member-licensed satellites alike, it would be fully consistent with the U.S. government's national treatment obligations.

would allow Intelsat to discriminate in markets in which it has market power and to cross-subsidize its service offerings in markets in which it does not.

E. Future IGO Affiliates. As noted by the Commission, the treaty-based heritage and possible government participation in future IGO affiliates "could pose a very high risk to competition in satellite services to, from and within the United States."[11] The Commission acknowledges that, given this risk, the United States took pains in the WTO negotiations to preserve its ability to protect against the anti-competitive effects of future IGO participation in the U.S. market, including the option to exclude a future affiliate from the U.S. market.[12] In this regard, United States Trade Representative Barshefsky, in letters sent to PanAmSat President and CEO Frederick A. Landman and other U.S. satellite industry executives, pledged that the U.S. government "will not grant market access to a future privatized affiliate, subsidiary or other form of spin-off from the ISOs, that would likely lead to anti-competitive results."[13]

For this reason, the Commission has proposed that, upon request by a future IGO affiliate to serve the U.S. market, it will review the affiliate's relationship to the IGO parent to ensure that (i) grant of such request would not create a significant risk to competition in the U.S. market, and (ii) that the IGO affiliate is structured to prevent a range of anti-competitive practices, including collusive behavior, cross-subsidization, and denial of market access.[14] The Commission also would seek to ensure that such IGO affiliate does not benefit directly or indirectly from IGO privileges and immunities.[15] In light of the commitments of the U.S. government

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11 Further Notice ¶ 35.
12 Id.
13 See, e.g., Letter dated February 12, 1997, from The Honorable Charlene Barshefsky, United States Trade Representative, to Frederick A. Landman, President and CEO of PanAmSat, at 2.
14 Further Notice ¶ 36.
15 Id.

to U.S. satellite licensees, as well as the serious competitive threat posed by future IGO affiliates, such an inquiry is both appropriate and necessary.[16]

II. U.S.-LICENSED OPERATORS AND NON-U.S. LICENSED OPERATORS SHOULD BE SUBJECT TO COMPARABLE LICENSING REQUIREMENTS.

PanAmSat supports the Commission's tentative conclusion that foreign systems serving the U.S. market must comply with all applicable rules and policies imposed on U.S. satellite licensees in order to ensure fair and effective competition.[17] Such a result comports with the U.S. government's national treatment obligations and fundamental principles of equitable treatment and fairness.

In this regard, PanAmSat urges the Commission to subject all authorizations granted to non-U.S. operators (for WTO and non-WTO members, for covered and "uncovered" satellite services) to the prohibition against maintaining an exclusionary relationship with any foreign country. If the Commission merely prohibits exclusionary arrangements for service between the United States and other countries, U.S. operators could be placed at a significant competitive disadvantage as a result of exclusionary arrangements in place for non-WTO member routes. This is particularly true if the Commission, as suggested by PanAmSat, declines to apply an ECO-Sat analysis to requests to use a WTO member satellite for non-WTO member routes. As discussed above, and as recognized by the Commission in the initial

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16 PanAmSat also supports the tentative conclusions in the Further Notice that (i) the ECO-Sat test should apply to all requests by non-U.S. satellite systems for delivery of services for which the United States has taken an MFN exemption (*i.e.*, DTH-FSS, DBS, and DARS), and (ii) applications covered by bilateral satellite agreements should be evaluated in the same manner in which applications by WTO members for covered services are treated. That said, if a bilateral agreement covers two or more types of satellite services, the Commission should retain the authority to deny access to operators licensed by the non-U.S. party to the agreement for all such services if U.S. licensees are denied access for any one of the services covered under the applicable bilateral agreement. Thus, if an agreement covered both FSS and DTH and the non-U.S. party subsequently denied U.S. operators access to its market for FSS services, the U.S. could deny access for both DTH and FSS services to operators licensed by the non-U.S. party.

17 Further Notice ¶ 44.

DISCO II Notice, the ability of a non-U.S. system to serve some routes closed to U.S. systems will disadvantage U.S. systems on all routes.

II. THE FCC SHOULD CONTINUE LICENSING RECEIVE-ONLY EARTH STATIONS OPERATING WITH NON-U.S. SATELLITES.

PanAmSat strongly supports the Commission's proposal to continue licensing receive-only earth stations operating with non-U.S.-licensed systems.[18] In light of the regulatory framework proposed in this proceeding (specifically the tentative conclusion not to require U.S. licenses for non-U.S. satellites), the earth station licensing process is the only mechanism available to ensure compliance with applicable licensing policies.

Although the Commission is not proposing to license receive-only earth stations operating with U.S.-licensed systems, in light of the Commission's finding that receive-only earth stations are used only in connection with "uncovered" services, the Commission's proposal does not run afoul of the U.S. government's national treatment obligations.[19]

In light of the proposal to require licensing of receive-only earth stations operating with any non-U.S. licensed systems, it is no longer appropriate for the Commission to permit receive-only earth stations to receive Intelsat K satellite transmissions and Intelnet I services on an unlicensed basis. As with other non-U.S. systems, the Commission — absent a licensing requirement — will have no mechanism to ensure compliance with its technical rules and competitive policies.

IV. FORM 312 SHOULD ELICIT INFORMATION ABOUT FUTURE IGO AFFILIATES.

In addition to information regarding the service to be provided, the country in which the satellite is licensed or will be licensed, countries in which signals

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18 Id. ¶ 57.
19 Id.

carried over the satellite will originate or terminate, and information regarding *de jure* and *de facto* barriers, Form 312 should require the applicant to identify if the non-U.S. satellite in question is owned, operated or controlled by an IGO affiliate that was created after the release date of the Further Notice. Such information will help the Commission ensure that grant of the application will not pose a competitive threat to the U.S. market.

CONCLUSION

PanAmSat eagerly awaits the implementation by all WTO members of the market opening commitments made in the WTO Basic Telecom Agreement. The Commission must set an example to other WTO members and implement the U.S. government's commitments quickly and in a manner that is fully consistent with its WTO offer and the pro-competitive spirit of the broader agreement. With respect to non-WTO members, the Commission should analyze requests to make use of satellites licensed by such countries under the ECO-Sat test. Such an approach will induce non-WTO members to eliminate market barriers and will promote competitive market conditions in the United States.

Respectfully submitted,

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